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**Review of chapters V and VI of the Model Law on Competition**

# Model Law on Competition (2018): Revised chapter VI*

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# Model Law on Competition (2018): Chapter VI

Notification, investigation and prohibition of mergers affecting concentrated markets

I. Notification

Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or conglomerate nature, should be notified when:

(a) At least one of the enterprises is established within the country;

(b) The resultant market share in the country, or any substantial part of it, relating to any product or service, is likely to create market power, especially in industries where there is a high degree of market concentration, where there are barriers to entry and where there is a lack of substitutes for a product supplied by firms whose conduct is under scrutiny.

II. Prohibition

Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, should be prohibited when:

(a) The proposed transaction substantially increases the ability to exercise market power (e.g. to give the ability to a firm or group of firms acting jointly to profitably maintain prices above competitive levels for a significant period of time);

(b) The resultant market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

III. Investigation procedures

Provisions to allow investigation of mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, which may harm competition, could be set out in a regulation regarding concentrations.

In particular, no firm should, in the cases coming under the preceding subsections, effect a merger until the expiration of a (...)-day waiting period from the date of the issuance of the receipt of the notification, unless the competition authority shortens the said period or extends it by an additional period of time not exceeding (...) days with the consent of the firms concerned, in accordance with the provisions of possible elements for article 7 below. The authority could be empowered to demand documents and testimony from the parties and from enterprises in the affected relevant market or lines of commerce, with the parties losing additional time if their response is late.

If a full hearing before the competition authority or before a tribunal results in a finding against the transaction, acquisitions or mergers could be subject to being prevented or even undone whenever they are likely to lessen competition substantially in a line of commerce in the jurisdiction or in a significant part of the relevant market within the jurisdiction.

# I. Introduction

1. Mergers and acquisitions are an integral part of economic activities today. From an economic perspective, different types of merger can be distinguished according to their motivation.

2. Industrial mergers are motivated, inter alia, by the following factors: geographic expansion; diversification of a company's activities or its products and services portfolio; consolidation of a company's market position; and greater production efficiency through economies of scale and scope, allowing a company to produce goods at a lower marginal cost while operating at the minimum efficient scale of production. As a result, this may allow firms better access to capital, the enhancement of research and development capacities, and better use of management skills. In addition, mergers present a means to exit from a given market, whether because the firm is failing or because it wishes to restructure its activities.

3. On the other hand, mergers and acquisitions may be carried out purely for investment purposes. In particular, private equity funds and investment banks acquire companies to increase shareholder revenues on a short-term basis and profitably resell the company or parts of it in the medium term.

4. Most mergers do not hamper competition in a market. However, some may alter the market structure in a way that raises concerns about competition. The merged entity may enjoy increased market power and face limited competition so that it will be in a position to restrict output and raise prices. Merger control aims to address concerns about competition arising from such mergers by preventing the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power.

5. Although most competition regimes around the world include merger control provisions, the content and enforcement of these provisions vary across different jurisdictions. Differences in the treatment of mergers under competition laws relate to, inter alia, the following:

(a) Legal provisions and enforcement policy relating to the different types of merger;

(b) Structural and behavioural factors that are taken into account and their relativ importance, including the market share and/or turnover thresholds to trigger scrutiny by competition authorities, and the anticompetitive criteria to be met before an arrangement would be forbidden in principle;

(c) Treatment of efficiency gains and of non-competition criteria;

(d) Coverage and structure of exemptions;

(e) Procedural arrangements, such as voluntary or compulsory notifications concerning mergers of firms meeting certain turnover or market share requirements, or ex post facto possibilities for intervening against mergers, and remedies or sanctions.

6. On the whole, however, there are more similarities than differences among most competition regimes relating to the treatment of mergers. In recent years, several countries have adopted separate provisions in their competition laws to cover mergers, and as part of this general trend towards the adoption or reform of competition legislation, many countries have adopted or reformed merger controls following the same broad orientations.

# II. Commentaries on chapter VI

## A. Terminology

7. An essential element of merger control legislation is the definition of those transactions that will be subject to control by the competition authorities. The underlying idea is to cover all transactions that transform formerly independent market players into a single player and thereby alter the structure of a market, possibly to the detriment of competition. Nevertheless, the terminology used for the definition of transactions subject to merger control varies significantly across jurisdictions. This section provides an overview of the various definitions of notifiable transactions and the potential harm they may cause to competition.

### Concentration

8. Concentration may be used to describe the acquisition of control over another undertaking through merger and acquisition activity or otherwise. It may therefore be used interchangeably with the term "merger" described below. Concentration may also be used to describe the number of players in a given market. Basically, a high level of concentration in a market indicates few market players, whereas low market concentration is indicative of numerous players in a market. The market concentration doctrine is widely used as an indicator of industry market power. Broadly, a relatively high level of concentration, when combined with high barriers to entry, is believed to facilitate industry collusion or dominance and provides the optimal environment for market players to exercise market power.[1]

### Merger

9. In corporate law, a merger is generally defined as a fusion between two or more firms previously independent of each other, whereby the identity of one or more is lost and the result is a single firm. In competition law, the term is often broader than its corporate meaning and can include an acquisition or takeover, a joint venture, or even other acquisitions of control, such as interlocking directorates (see below).

### Acquisition or takeover

10. The acquisition or takeover of one firm by another usually involves the purchase of all or a majority of shares of another firm, or even of a minority shareholding, as long as it is sufficient to exercise control and substantial influence. In some countries, the acquisition of substantial assets of another firm also qualifies as a notifiable transaction, if it allows the acquirer to enter into the related market position of the seller. The acquisition of a production site or another functional unit of another firm may serve as an example in this respect. Acquisitions may take place without the consent of the target firm. This is known as a hostile acquisition or takeover.

11. As mentioned above, joint ventures and interlocking directorships are often included within the definition of mergers for the purposes of merger control.

### Joint ventures

12. Joint ventures are "agreements between firms to engage in a specific joint activity, often through the creation of a jointly owned and controlled subsidiary, to perform a task useful to both or to realize synergies from the parents' contributions". They may produce "commonly needed inputs, manufacture commonly produced outputs or combine expertise for research and development".[2]

13. Alliances are a type of joint venture, which are used for joint endeavours by firms in different geographic markets and allow for mutual penetration in each partner's market.

[1] B Espen Eckbo, 1985, Mergers and the market concentration doctrine: Evidence from the capital market, *Journal of Business*, 58:325–349.

[2] E Fox, 2008, Competition law, in A Lowenfeld, *International Economic Law*, Second edition (Oxford University Press, London).

Alliances are often the preferred structure for mergers in the airline and telecommunications industries.[3]

14. If a collaboration creates a new function or business, or performs an old function better, then it usually has pro-competitive effects. However, competition concerns arise where a joint venture serves to create or enhance market power, entails overly restrictive ancillary agreements or is an unnecessary vehicle by which to achieve the desired objectives (that is to say a less anticompetitive means is available). In such circumstances, a joint venture may harm competition and might even be used to disguise collusive activities such as price fixing or market division.[4] For example, this will be the case when the common links of the two parent firms to the joint venture lead to collusion outside the scope of the joint venture (spillover effects).[5] Reduction of actual or potential competition and foreclosure could also occur. Depending on the degree of integration between the two businesses, a joint venture can be reviewed as a merger or simply as an agreement among competitors.

**Interlocking directorship**

15. An interlocking directorship describes a situation where a person is a member of the board of directors of two or more firms, or where the representatives of two or more firms meet on the board of directors of one firm.

16. In this case, the competition concerns are based on the possibility that an interlocking directorship may lead to administrative control whereby decisions regarding investment and production can, in effect, lead to the formation of common strategies among otherwise competing enterprises, on prices, market allocations and other concerted activities. At the vertical level, interlocking directorships can result in the vertical integration of activities between suppliers and customers, for example, discouraging expansion into competitive areas and leading to reciprocal arrangements among them.

17. As shown in table VI.1, the definition of mergers can vary, depending on the legislation of a country or a group of countries.

Table VI.1
**Alternative approaches in existing legislation: Definition of merger**

| | |
|---|---|
| Brazil | All mergers, acquisitions and associations, including joint ventures, are covered by the Brazilian merger regulations as long as they meet prescribed thresholds and have certain defined effects on the market in Brazil (Law No. 12.529 of 30 November 2011, article 90). |
| China | The definition of mergers and acquisitions is very broad, emphasizing the effect of control. According to the Anti-Monopoly Law of China, article 20, the definition includes mergers of business operators or acquirements of equities or assets or the exertion of a decisive influence on other business operators by contract or any other means. |
| European Union | Concentrations under the European Commission Merger Regulation[a] include any merger of two or more previously independent undertakings, or the acquisition of direct or indirect control of the whole or part(s) of another undertaking, which brings about a durable change in the structure of the undertaking concerned.<br><br>This includes all full-function joint ventures that meet a prescribed turnover threshold. Full-function joint ventures |

[3] Ibid.

[4] Ibid.

[5] A Jones and B Sufrin, 2016, *EU [European Union] Competition Law: Text, Cases and Materials*, Sixth edition (Oxford University Press, Oxford and New York).

| | |
|---|---|
| | include those that are autonomous economic entities resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parent companies (see European Commission Merger Regulation, article 3). |
| South Africa | The Competition Act 89 (1998), chapter 3, clause 12 provides the following definition: any transaction involving the direct or indirect acquisition or establishment of control by one or more persons over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of shares, interest or assets, by amalgamation, or by any other means. However, the Act does not provide a closed list of how control may be achieved. The Act applies to small, intermediate and large mergers, but ordinarily, only intermediate and large mergers require prior notification and approval. |
| United States of America | Merger regulations cover acquisitions of assets or voting securities. Such acquisitions may include acquisitions of a majority or minority interest, joint ventures, mergers or any other transaction that involves an acquisition of assets or voting securities (see Hart–Scott–Rodino Antitrust Improvement Act (1976)). |

[a] Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (*Official Journal of the European Union*, L24/1 of 29 January 2004).

18. From an economic perspective, a merger may be horizontal, vertical or conglomerate.

**Horizontal mergers**

19. Horizontal mergers are mergers that take place between actual or potential competitors in the same product and geographic markets and at the same level of the production or distribution chain. Such mergers raise competition concerns because they may lead to a reduction in the number of rivals on the market, causing increased market concentration. Furthermore, a horizontal merger usually results in the merged entity gaining a larger market share by aggregation.

20. This combination may be problematic for two reasons. Firstly, owing to its larger combined market share and the reduced number of competitors on the market, the merged firm may have gained market power, allowing it to unilaterally raise prices and restrict outputs (unilateral effects). Secondly, the resulting increase in market concentration makes it easier for market players to coordinate and exercise joint market power by engaging in interdependent behaviour (coordinated effects).[6]

21. More than other types of merger, horizontal mergers may present severe competition concerns, contribute most directly to a concentration of economic power and lead to a dominant position of market power or unlawful collusions.

**Vertical mergers**

22. Vertical mergers occur where firms that operate at different levels of the production and distribution chain merge (a merger between a supplier and a distributor). Vertical mergers generally raise fewer competition concerns than horizontal ones and may even prove beneficial if savings from synergies and efficiencies are transferred to consumers by way of lower prices. However, vertical mergers may raise concerns where they lead to foreclosure – where the merged entity will have the ability to control the chain of production and distribution, allowing it to drive existing competitors out of the market or create or increase barriers to the entry of new competitors at one or more functional levels. In addition,

[6] R Whish, 2009, *Competition Law*, Sixth edition (Oxford University Press, Oxford).

vertical mergers may increase the ease with which competing firms can coordinate, if, for example, they lead to increased price transparency.[7]

**Conglomerate mergers**

23. The term "conglomerate mergers" refers to mergers between parties involved in totally different markets and activities. Generally, they raise few competition concerns, as they do not affect or change the structure of competition in a specific market. However, in some circumstances, conglomerate mergers may grant the merged entity market power, allowing it to foreclose competitors in separate but related markets.

**Notification obligations**

24. Merger notifications bring mergers to the attention of competition authorities and facilitate the enforcement of merger control. Merger notification obligations vary across competition law regimes (table VI.2). These variations fall into three broad categories:

(a) Those that mandate notification prior to the completion of a merger transaction (mandatory ex ante regimes);

(b) Those that allow merging parties to notify authorities after the merger is consummated (mandatory ex post regimes);

(c) Those that leave it entirely to the discretion of the merging parties (voluntary regimes).

25. Many voluntary regimes encourage informal inquiries and notification from merging parties to reduce the risk of the completion of anticompetitive mergers and to avoid the need for costly intervention by a competition authority. Nonetheless, whether notification requirements are voluntary or mandatory, competition authorities usually have the power to investigate potentially anticompetitive mergers if they are consummated without authority clearance and often can apply remedies or seek these from a court to minimize or counter any anticompetitive effects from such mergers.

26. To ensure procedural efficiency and minimize administrative costs, virtually all competition law regimes limit a notification obligation to transactions of a certain economic significance that may potentially raise competitive concerns. This objective is realized through notification thresholds pertaining to the asset value and/or turnover of the merging parties, their geographical position and the combined market share of the merging parties in the relevant markets. Only when the proposed transaction reaches the respective notification threshold is the notification obligation triggered.

Table VI.2
**Alternative approaches in existing legislation: Jurisdictional thresholds**

| | *Voluntary merger control regimes* |
|---|---|
| Australia | The Competition and Consumer Act (2010), section 50 prohibits corporations from directly or indirectly acquiring shares or assets if doing so will substantially lessen competition in a substantial market in Australia. Although notification is voluntary, the 2008 Australian Competition and Consumer Commission Merger Guidelines, updated in 2017, indicate that the Commission expects to be notified of mergers well in advance where the products or services of the merged parties are either substitutes or complements and the merged firm will have a post-merger market share of greater than 20 per cent. |
| Hong Kong, China | The Competition Ordinance (2012) does not specify any numeric filing thresholds, but mergers that substantially lessen competition in Hong Kong, China are prohibited (section 3(1), schedule 7 of the Ordinance). |

[7] Ibid.

| | *Voluntary merger control regimes* |
|---|---|
| | According to the guideline on the Merger Rule (paragraph 3.13), issued by the Competition Commission and the Communications Authority in July 2015, in general, a horizontal merger where the post-merger combined market share of the parties to the transaction is 40 per cent or more is likely to raise competition concerns. |
| Mauritius | Where two or more firms intend to merge, any one of the firms may apply to the Competition Commission for guidance as to whether the proposed merger is likely to result in substantial lessening of competition within any market for goods or services (Competition Act 2007, section 47). The Commission shall review merger situations in the following conditions:<br>(a) All the parties to the merger supply or acquire goods or services, and will, following the merger, together supply or acquire 30 per cent or more of all those goods or services on the market;<br>(b) One of the parties to the merger alone supplies or acquires prior to the merger, 30 per cent or more of goods or services on the market (Competition Act 2007, section 48). |
| United Kingdom of Great Britain and Northern Ireland | Jurisdictional thresholds are based on the fulfilment of certain criteria: meeting a turnover test and/or a share of supply test. The turnover test is met where the target company has a turnover of more than £70 million, which will capture the majority of significant acquisitions. The supply test criteria is met where both parties are active in a particular market segment and their combined share of this segment is more than 25 per cent. |
| | *Mandatory merger control regimes* |
| Canada | The Competition Act (1985), which was last amended on 12 December 2017, establishes various thresholds:<br>(a) Size-of-transaction threshold: Target has assets in Canada, or revenues in or from Canada, generated by assets in Canada that exceed Can$86 million;<br>(b) Size-of-parties threshold: Parties to the transaction, including all affiliates, have combined assets in Canada or revenues from sales in, from or into Canada that exceed Can$400 million;<br>(c) (d) Size-of-equity threshold: Triggered by acquisition of more than 20 per cent of voting shares of a public company or more than 35 per cent of voting shares of a private company or more than 35 per cent interest in a non-corporate entity. |
| Chile | A mandatory pre-merger notification system, which entered into force on 1 June 2017, was introduced by the new competition law that was enacted in August 2016. To provide guidance to the parties to a transaction on the filing thresholds and the merger review process, the Government published a regulation detailing the information requirements for the notification of concentrations to the National Prosecutor's Office, which issued guidelines on competition, turnover thresholds and remedies. |

| | *Mandatory merger control regimes* |
|---|---|
| European Union | The European Commission Merger Regulation states that concentrations that have a Community dimension must be notified to the competition authority. Save for one exception, when each of the parties achieves more than two thirds of its aggregate Community-wide turnover in one and the same member State,[a] a Community dimension is determined by reference to turnover thresholds, which are as follows:<br>(a) The aggregate worldwide turnover of all the parties exceeds €5 billion;<br>(b) The Community-wide turnover of each of at least two parties exceeds €250 million. |
| Israel | A transaction that is categorized as a merger of companies will be subject to additional threshold tests pursuant to the Restrictive Trade Practices Law, 5748-1988, section 17 if the market share of the merging companies exceeds 50 per cent, the combined sales turnover of the merging companies in the fiscal year preceding the merger exceeded NIS 150 million (approximately $42 million) or one of the merging companies is a monopoly (that is to say, the market share exceeds 50 per cent). |
| South Africa | Generally, notification requirements apply solely to intermediate and large mergers. The thresholds for intermediate and large mergers differ but are assessed annually. These thresholds relate to the turnover and assets of the merging parties. |
| Sweden | A concentration shall be notified to the Swedish Competition Authority if the combined aggregate turnover of all the undertakings concerned in the preceding financial year exceeds SEK 1 billion and at least two of the undertakings concerned had a turnover in Sweden in the preceding financial year exceeding SEK 200 million for each of the undertakings. Notably, the thresholds that apply in Swedish merger control apply only to the turnover of the undertakings in Sweden (that is to say, a strong local nexus). |
| United States | Under the Hart–Scott–Rodino Antitrust Improvement Act, chapter 1, paragraph 18(a), notification is required where the following conditions are met:<br>(a) Commerce test: Either the acquiring or the acquired party is engaged in United States commerce or in any activity affecting such commerce;<br>(b) Size-of-transaction test: The amount of voting securities or assets that will be held as a result of the acquisition meets a dollar threshold (the threshold is adjusted annually and is $84.4 million in 2018);<br>(c) Size-of-the-parties test:[b] The size-of-the-parties test applies solely to transactions with a value that does not exceed $337.6 million (subject to annual adjustment). The test is met if one party has worldwide sales or assets of $16.9 million or more (as adjusted annually), and the other has worldwide sales or assets of $168.8 million or more (as adjusted annually).<br>The merger does not qualify for any of the exemptions set out in the Act, for example the acquisition of nonvoting securities. |

[a] See Council Regulation (EC) No. 139/2004, article 1.

[b] The thresholds are for 2018 as revised by the Federal Trade Commission. See Federal Register, Vol. 83, No. 19, 29 January 2018.

## B. Merger control analysis

27. Again, there is large variation among jurisdictions worldwide in relation to assessing the legality of mergers (table VI.3). Most frequently, one of the following tests is applied to assess the outcomes that are likely to occur as a result of the merger:

(a) Will there be a substantial lessening of competition in a given market?

(b) Will the merger result in the creation or strengthening of a dominant position?[8]

(c) Will competition be prevented, distorted and/or restricted?

Table VI.3
**Alternative approaches in existing legislation: Substantive assessment criteria**

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|---|---|
| Brazil | Brazilian competition law contains tests for dominant position and lessening or restriction of competition. In July 2016, the competition authority issued new horizontal merger guidelines. These guidelines include factors considered in the authority's assessment of horizontal mergers, including the analysis of portfolio power, potential competition, the elimination of mavericks and partial acquisitions. The guidelines discuss issues such as market participation and balance, inputs supply to competitors, unilateral effects, homogenous and differentiated products, purchase power, consumer welfare and coordinated effects. (See http://en.cade.gov.br/press-releases/cade-publishes-guidelines-on-horizontal-mergers, accessed 18 May 2018). |
| China | The Anti-monopoly Law prohibits mergers that have, or are likely to have, the effect of eliminating or restricting competition, unless the parties can show that the concentration may improve conditions for competition and that the positive effects on competition resulting from the merger outweigh any negative effects. The Ministry of Commerce may also permit mergers on certain public interest grounds. The following factors are taken into account by the Ministry when assessing a merger:<br>(a) Market share of the merging parties and their ability to control the market;<br>(b) Level of concentration in the relevant market;<br>(c) Likely effect of the merger on market access and technology development;<br>(d) Likely effect of the merger on consumers and other market players;<br>(e) Likely effect of the merger on the development of the national economy;<br>(f) Other factors affecting competition that are considered relevant by the Ministry. |
| Costa Rica | The competition authority will approve mergers whose purpose or effect does not include the following:<br>(a) Acquiring or significantly increasing substantial power, leading to a limitation or elimination of competition;<br>(b) Facilitating collusion or express coordination among competitors or producing adverse results for consumers;<br>(c) Reducing, harming or impeding competition or free market participation for equal, similar or substantially related goods or services (Law No. 7472 of 1994, as amended on 5 April 2013). |

[8] Higher consumer prices or reduced output are the usual indicia of these effects.

| | |
|---|---|
| European Union | The European Commission Merger Regulation prohibits mergers that significantly impede effective competition in the Common Market, or a substantial part of it, particularly as a result of the creation or strengthening of a dominant position (see Council Regulation (EC) No. 139/2004, article 2). |
| India | The substantive test for assessing a merger is whether it has caused or is likely to cause an appreciable adverse effect on competition within the relevant market in India. The Competition Commission considers the following factors:<br>(a) Change in the market share due to the transaction;<br>(b) Entry barriers;<br>(c) Whether parties to the transaction have overlapping businesses, either horizontal or vertical.[a] |
| United States | The Clayton Act (1914) prohibits acquisitions that may result in the substantial lessening of competition or the creation of a monopoly. Various merger guidelines published by the antitrust agencies have also indicated that mergers should not be permitted if they create or enhance market power or facilitate its exercise. A merger enhances market power if it is likely to encourage one or more firms to raise prices, reduce output, diminish innovation or otherwise harm customers as a result of diminished competitive constraints or incentives (Department of Justice and Federal Trade Commission, 2010, Horizontal Merger Guidelines, 19 August). |
| Zambia | The Commission carries out three substantive tests before clearing a proposed merger:<br>(a) Market assessment test to determine the likely effects on trade and the economy in general of the proposed merger in the relevant market;<br>(b) Competition assessment test to assess whether the merger is likely to prevent or substantially lessen competition in a market in Zambia. The Commission analyses the likely and actual factors that affect competition in a defined market, which include the following:<br>(i) Concentration levels of players in the relevant market;<br>(ii) Entry barriers;<br>(iii) Level of imports in the relevant market;<br>(iv) Extent to which there is countervailing buyer or supplier power in the relevant market;<br>(v) Availability of substitute products in the relevant market;<br>(vi) Likelihood of the merger removing from the market an existing effective and vigorous competitor;<br>(vii) Dynamic characteristics of the market such as growth, innovation, pricing and other inherent market characteristics;<br>(viii) Risk of abuse of a position of dominance;<br>(c) Public interest assessment test to determine whether the proposed merger will be in the public interest.<br>(Competition and Consumer Protection Act (2010), part IV, Mergers) |

[a] International Comparative Legal Guides, 2017, Merger control 2018/India, available at https://iclg.com/practice-areas/merger-control-laws-and-regulations/india (accessed 18 May 2018).

28. Merger control analysis is necessarily forward looking and involves a comparison of the market situation before and after the proposed merger to assess the potential effect on competition (counterfactual or prognosis analysis).[9] A counterfactual analysis of the market generally incorporates the following factors:[10]

(a) Market definition: What is the relevant market in geographical or product terms?

(b) Assessment of the pre-merger market structure and concentration: What existing firms are there? What are their shares and strategic importance with respect to the product markets? Which firms might offer competition in the future?

(c) Assessment of the likely effects of the notified merger, including unilateral and coordinated effects: the likelihood that the merged entity will have the power to exercise market power unilaterally and that the merger will give rise to more opportunity for market players to coordinate behaviours;

(d) Likelihood of new entry and of the existence of effective barriers to new entry and expansion.

29. It is often up to the merging parties to rebut any theory of competitive harm put forward and to show that the merger will not adversely affect the competition in the market in comparison with the status quo. A careful balance must be struck with regard to the evidence requirements. On one hand, competition authorities must ensure that the criteria are not so demanding that they cause beneficial mergers to be abandoned, and on the other hand, that the standard of proof is not so low that some harmful mergers are cleared.

30. In addition to the above general themes, some jurisdictions include other public interest considerations on merger control analysis. Such considerations include, inter alia, financial stability, protection of national champions, industrial policies, promotion of employment, survival of small and medium-sized enterprises, and increasing the ownership status of historically disadvantaged persons. While many of these public interests are important, they are not strictly related to competition, and usually entail certain trade-offs (for example, an outcome that is less than the most efficient).

31. The formation of national champions presents an interesting example of such a trade-off. Some nations with small markets may wish to channel the merger of domestic firms into one national champion, resulting in a monopoly position domestically, based on the argument that this might allow the national champion to be more competitive in international markets. However, in the absence of regulatory controls, such champions are very likely to extract monopoly rents domestically, and without the discipline of competition in their domestic markets, may also fail to become more competitive in international markets, to the ultimate detriment of domestic consumers and eventually to the development of the economy as a whole. Moreover, in the case of small economies, domination of the domestic market is unlikely to generate the economies of scale necessary to be internationally competitive. On the other hand, if the local market is open to competition from imports or foreign direct investment, the world market might be relevant for the merger control test, and the single domestic supplier may be authorized to merge. Consequently, competition authorities need to weigh considerations of international competitiveness against the potential resultant harm to the domestic market.

32. What is certain is the necessity for competition authorities and governments to engage in thorough deliberation to decide whether public interest considerations should be adopted in the competition policy or if they are better achieved through alternative and more effective means.[11]

[9] Whish, 2009.

[10] International Network Competition, 2006, Merger Guidelines Workbook.

[11] Whish, 2009.

## C. Remedies

33. Competition authorities usually have the power to clear or prohibit a merger based on their analysis of its likely effects on competition. Furthermore, where a notified transaction raises competitive concerns, a number of merger control regimes allow the notifying party to propose remedies and thereby restructure the proposed transaction in a way that resolves the competition issues. The competition authority would then have to assess the altered transaction. Other jurisdictions empower the competition authority to impose such remedies upon the notifying parties (table VI.4).

34. Taking into account that merger control is concerned with safeguarding competitive market structure, structural remedies appear to be the first choice to remedy competitive concerns raised by a transaction under scrutiny. The divesture of certain aspects of the merging parties' businesses (usually areas of overlap) in order to prevent or reduce the increase of market power is the most effective form of structural remedy available to competition authorities.

35. Structural remedies are easier to adopt in mandatory ex ante or pre-notification regimes, as the merging parties can be required to put the structural changes in place before the merger has been completed. Although many authorities have the power to undo anticompetitive mergers after they have been consummated, this is clearly a more disruptive and time-consuming approach.

36. Many competition authorities may also utilize behavioural remedies whereby merging parties agree to take certain actions upon completion of a merger (granting licences to competitors, for example) which address competition concerns. In merger cases, behavioural remedies are generally less effective than structural ones, owing to difficulties in monitoring and tracking implementation.

Table VI.4
**Alternative approaches in existing legislation: Remedies**

| | |
|---|---|
| Brazil | The competition authority has extensive remedial powers and is expressly permitted to use whatever measures available to resolve any damage to competition resulting from a merger. This includes requiring the dissolution or break-up of the merged entity. (See Brazilian Antitrust Law No. 12.529, article 61, of 30 November 2011). |
| China | The Anti-monopoly Law grants the Ministry of Commerce the power to block mergers or impose remedies before clearance is granted. It also has at its disposal various legal sanctions against merging parties for noncompliance and may impose structural remedies, behavioural remedies, or a combination of both. |
| European Union | The Commission has the power to fine firms up to 10 per cent of their aggregate annual worldwide turnover for failing to comply with requirements to suspend implementation of a merger pending Commission examination, or for consummating a merger that has been prohibited by the Commission. The Commission may also impose periodic penalty payments of up to 5 per cent of average daily worldwide turnover for each day that an infringement persists. Furthermore, fines of up to 1 per cent of aggregate worldwide turnover may be imposed in certain circumstances, for instance where misleading or incorrect information is supplied by the merging parties. In the event that an anticompetitive merger has already been completed, the Commission may require its complete dissolution and may impose interim measures or other action necessary for the restoration of effective competition in the given market. (See Council Regulation (EC) No. 139/2004, article 8.) |

| | |
|---|---|
| Kenya | According to the Competition Act No. 12 (2010), any person who fails to comply with part IV notification and approval requirements commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million Kenya shillings, or both. The Authority may impose a financial penalty for an amount not exceeding 10 per cent of the preceding year's gross annual turnover of the undertaking(s) in Kenya. As stated in section 42 of the Act, a merger that is implemented without an authorizing order by the Authority shall have no legal effect. |
| Russian Federation | The Federal Law on the Protection of Competition (2006), article 34(1), as amended in 2016, states that mergers or acquisitions falling under Anti-Monopoly Law article 27 and exercised without the preliminary consent of the antimonopoly body shall be "liquidated or reorganized in the way of separation or detachment at law on the antimonopoly body's claim".<br><br>Article 34(2) of the Law states that transactions referred to in articles 28 and 29, if exercised without preliminary consent of the antimonopoly body, shall be recognized invalid at law on the antimonopoly body's claim if these transactions or other actions lead or may lead to restriction of competition. |
| United States | The competition authorities may seek an injunction in the federal court to prohibit completion of a proposed merger. The Federal Trade Commission may also bring administrative proceedings to determine the legitimacy of a merger. Failure to comply with provisions of the Hart–Scott–Rodino Antitrust Improvement Act on notification may result in a fine of up to $10,000 per day for the period of violation. Structural remedies are commonly used, particularly in the form of a consent order requiring merging parties to divest certain portions of existing assets or a portion of assets to be acquired on completion of the transaction. Behavioural remedies are also available to authorities, but it is uncommon for them to be used in merger cases. |

## D. Cross-border acquisition of control

37. Given their potential effects on the local market, many competition law regimes also subject to foreign-to-foreign mergers to control by the local competition authorities. Foreign-to-foreign mergers are mergers, takeovers or other acquisitions of control involving companies that are incorporated in other countries, but that nevertheless generate turnover on the local market, either through local subsidiaries or through cross-border direct sales.

38. Competition authorities should be aware of two problems that may emerge in the international arena. First, assessment decisions of the same transaction may differ between jurisdictions when there is a divergence in the standards of assessment or where dissimilar market conditions may lead to a different result, even if the same substantive test is used. Second, the application of varying pre-merger notification and clearance provisions to the same transaction imposes high transaction costs on the notifying parties. [12] International cooperation can solve some of these concerns.

## E. Recent enforcement trends

39. In Argentina, the Congress approved the reform of the competition law in November 2017. The bill may enter into force after approval by the Senate, where it was scheduled for consideration in March 2018. According to the new competition law, merging

[12] Fox, 2008.

parties shall no longer be able to close a transaction prior to approval, given the shift towards a suspensive system. The bill also includes a revised timeline for transaction reviews, which would now be 45 days, with an additional 120-day extension in the case of transactions that require greater scrutiny.[13]

40. In Saudi Arabia, the Council is becoming more active in merger control, with a significant increase in the number of transactions being notified for review. In terms of enforcement actions, the Council issued its first prohibition decision in July 2014 and is also investigating a possible failure to notify. Inquiries to date have related exclusively to transactions involving Saudi entities. Saudi Arabia now has one of the most prominent emerging competition law regimes in the Middle East. Direct enforcement by the Competition Council is also resulting in an increasing amount of competition litigation, as defendants regularly appeal the fines imposed by the Council. This may present some challenges for the judiciary, as judges become familiar with relatively new competition law concepts. As the system continues to develop, other neighbouring countries, including Kuwait, Oman and the United Arab Emirates, may look to the Saudi experience as they seek to develop their own competition law compliance and enforcement regimes.[14]

41. In the United Arab Emirates, the competition law is still in its very early stages and so far, there have not been any enforcement cases. The law was originally published in February 2013, and its regulations, which contain necessary details on its scope and applications, were issued in October 2014. These have clarified a number of important procedural issues. However, there remain certain gaps in the legislation to be addressed separately through further Cabinet resolutions, particularly in relation to the applicable filing thresholds. It is not clear to what extent companies that engage in transactions in the United Arab Emirates and which may result in significant market shares might be expected to file notification, or indeed whether a transaction review might be sparked by a third-party complaint, for which the procedure has now been formally established. Another issue, which would require clarification, is the responsibility of the business being acquired to file the transaction.[15]

42. In China, there are more and more merger reviews for transactions between multinational companies. One of the notable foreign-to-foreign merger cases in 2012 was the Google–Motorola Mobility case. The Ministry of Commerce set behavioural conditions to ensure, among others, that Google would continue to offer its Android platform on a free and open-source basis, and that it would continue to comply with the fair, reasonable and non-discriminatory licensing terms in connection with Motorola Mobility's significant portfolio of standard essential patents in the telecommunications sector. Another interesting merger case, which shows the increasing involvement of China in the review of multinational mergers is the United Technologies Corporation–Goodrich merger. In this case, the Ministry imposed the structural remedies before its counterparts in the United States and the European Union had even completed their review of the merger. This indicates that the Ministry is taking an increasingly proactive stance with regard to remedies imposed on foreign-to-foreign mergers. In 2014, the Ministry of Commerce imposed remedies on foreign-to-foreign transactions, including Thermo Fisher–Life Technologies, Microsoft–Nokia and Merck–AstraZeneca, as well as the joint venture between Corun, Toyota China, Primearth EV Energy, Sinogy and Toyota Tsusho. On 19 October 2015, the Ministry conditionally cleared the Nokia acquisition of Alcatel Lucent. For the first time, the Ministry provided guidance on defining a bona fide or willing licensee and guidance on when a licensor of standard essential patents may or may not seek an injunction against a willing licensee. The decision highlights the Ministry's ability to grapple with some of the challenging issues associated with the licensing of such patents and antitrust and reflects a willingness to ensure that standard essential patents are accessible to Chinese technology companies.[16]

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[13] J Davies, ed., 2017, *Merger Control 2017: Getting the Deal Through* (Law Business Research, London).

[14] Ibid.

[15] Ibid.

[16] Ibid.

43. In the United States, the Federal Trade Commission recently won two cases using a market definition based on national customers. In the Sysco Corporation and United States Foods merger case, the Commission filed a complaint in February 2015 alleging that if the merger was approved as proposed, national foodservice customers, including restaurants, hospitals, hotels and schools, would likely face higher prices and lower levels of service than would otherwise be the case in the absence of the merger. With regard to the proposed sale of 11 United States Foods distribution centres to Performance Food Group, the Commission stated that this proposed remedy would neither enable the Group to replace United States Foods as a competitor nor counteract the significant competitive harm caused by the merger. The court rejected the argument in support of the proposed remedy and granted the Commission the requested preliminary injunction. The parties abandoned the merger on 29 June 2015.[17]

44. The European Commission issued Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (2013/C 366/04). This notice sets out a simplified procedure under which the Commission intends to treat certain concentrations that do not raise competition concerns. The European Union has seen an important increase in the number of notifications, as in the number of phase II proceedings. In 2016, the Commission blocked C.K. Hutchiston's plan to combine its mobile operations with those of O2 in the United Kingdom. The prohibition came less than one year after TeliaSonera and Telenor abandoned plans to merge their Danish businesses due to an expected prohibition. Other high-profile mergers that have been abandoned include the proposed mergers between Mondi and Walki in December 2015 and Halliburton and Baker Hughes in May 2016.[18]

45. One of the novelties in merger review is the recent approach by competition authorities to examine the impact of a merger on innovation competition. In March 2017, the European Commission cleared the merger between Dow and DuPont subject to conditions following an in-depth review of the merger, including the divestiture of major parts of the latter's global pesticide business, including its global research and development organization. The Commission was concerned that the transaction might have a significant impact on innovation by removing the parties' incentives to continue to pursue ongoing parallel innovation efforts, as both parties were competing head to head in a number of important herbicide, insecticide and fungicide innovation areas. Another concern was the impact that might be generated by removing the parties' incentives to develop and bring to market new pesticides. In this respect, the Commission found evidence that the merged entity would have less incentives and ability to innovate than the two companies would have separately. In its investigation, the Commission also found evidence that the merged entity would reduce spending on developing innovative products. After the merger, the merged company would have only three global integrated players as competitors in an industry with very high entry barriers. To address these concerns, the parties offered a set of commitments, which were accepted by the Commission.[19]

46. Recent years have also seen a substantial increase in concentration in high-technology markets involving the following companies: Google and DoubleClick, Microsoft and Yahoo, Microsoft and Skype, Facebook and WhatsApp, and Microsoft and Linkedin. The European Commission approved the Microsoft–Skype merger despite the fact that the combined market share in the consumer telecommunication market in a post-transaction scenario was close to 90 per cent. This decision was based mainly on the following factors: the dynamic and fast-growing nature of the telecommunications sector, low barriers to entry, lack of network effects and the number of operators active in the market, including Google and Facebook. The decision was upheld by the General Court in its landmark judgment in case T-79/12

[17] Ibid.

[18] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214(02)&from=EN (accessed 16 May 2018).

[19] European Commission, 2017, Mergers: Commission clears merger between Dow and DuPont, subject to conditions, 27 March, available at http://europa.eu/rapid/press-release_IP-17-772_en.htm (accessed 16 May 2018).

*Cisco Systems, Inc. and Messagenet SpA v. Commission*.[20] The Commission decision is in the same line as the ones adopted by the competition authorities in Australia, Brazil, the Russian Federation, Serbia, the United States and Taiwan Province of China. In December 2016, the European Commission approved the merger of Microsoft and Linkedin subject to certain conditions, contrary to Brazil, Canada, South Africa and the United States, which approved it unconditionally. In particular, the European Commission noted the risk of market foreclosure. In its decision, the Commission looked at the effects that the combination of data might bring from a horizontal, vertical and conglomerate perspective. In doing so, the Commission provided further clarity on how it assesses what is commonly referred to as big data issues, that is, the aggregation under common ownership of large sets of data in merger cases.[21]

47. The United States also encountered certain challenges in assessing the effects on competition in merger cases in the technology market. First, defining a relevant market, in which competition is constrained, is not possible using traditional methods, when either the market does not yet exist or where one of the parties does not yet compete. Second, given the nature of innovation competition, it may be hard to know when innovation will best be prompted, whether by pooling research and development resources or by preserving separate, independent competitors pursuing competing solutions. The Federal Trade Commission tackled these issues in the acquisition of Arbitron Inc. by Nielsen Holdings NV. The Commission took the position that the transaction would be likely to eliminate future competition for the provision of natural syndicated cross-platform audience measurement services, allow Nielsen to unilaterally exercise market power in the market for national syndicated cross-platform audience measurement services and result in higher prices for such services.[22] Although this theory of harm related to a future market, the Commission noted that, based on the evidence, a remedy was necessary to "address the likely competitive harm that would result from the acquisition".[23] The Commission also supported its decision by referring to the 2010 Horizontal Merger Guidelines, which indicate that the agencies will consider whether the merging firms have been or will likely become "substantial head-to-head competitors", had the merger not taken place.[24] On the basis of the Commission's position, the parties agreed to support new entry by providing the third-party with a royalty-free licence to Arbitron's cross-platform audience.

48. Addressing concerns about innovation competition and competition in future high-technology markets have been challenging for competition agencies. Finding the appropriate remedies to address such concerns has not even been possible in some cases for merging parties. The *Applied Materials' acquisition of Tokyo Electron* case is one such example, where the Department of Justice considered that these two firms were the two primary competitors in a future market for products being developed. The parties abandoned merger plans after Department of Justice rejected their proposed remedy on the grounds that the proposed divestiture package was insufficient to address innovation concerns. Finally, the *Microsoft/Yahoo* and *United States v. American Express Company* cases reveal the need to consider the particularities of high-technology multi-sided markets, which include players such as Amazon, Facebook, Google and Uber in analyzing the effect of mergers in these markets.[25]

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[20] General Court of the European Union, 2013, Microsoft's acquisition of Skype is compatible with the internal market, 11 December, available at http://europa.eu/rapid/press-release_CJE-13-156_en.htm (accessed 16 May 2018).

[21] European Commission, 2017, Competition Merger Brief, Issue 1/2017, available at http://ec.europa.eu/competition/publications/cmb/2017/kdal17001enn.pdf (accessed 17 May 2018).

[22] Federal Trade Commission and Department of Justice, 2013, Hart–Scott–Rodino Annual Report: Fiscal Year 2013.

[23] Federal Trade Commission, 2013, Statement of the Federal Trade Commission: In the Matter of Nielsen Holdings N.V. and Arbitron Inc, available at https://www.ftc.gov/system/files/documents/public_statements/297661/140228nielsenholdingstatement.pdf (accessed 23 May 2018).

[24] Ibid.

[25] CS Hataway and MS Wise, 2016, US [United States] merger control in the high-technology sector, in I Knable Gotts, ed., *The Merger Control Review* (Law Business Research, London).